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California Aims to Provide More Information to Consumers with Prop. 65 Warning Changes

California's Office of Environmental Health Hazard Assessment (OEHHA) has completed a [comprehensive overhaul](#) of the “clear and reasonable” warning regulations for the Safe Drinking Water and Toxic Enforcement Act (Prop. 65). The new regulations, which took effect August 30, 2018, require Prop. 65 disclosures to include chemical names and a URL to the state’s [new Prop. 65 website](#). The required warning language depends on whether the listed chemical has been deemed to pose a risk of cancer, reproductive toxicity or both. The disclosure must also include a triangular warning symbol, printed in color unless the product's sign, label or shelf tag is in black and white. This regulatory change is California’s attempt at limiting overwarning and providing information to consumers on the exact chemicals contained in the products.

Beyond the changes to the warning label itself, the most important change to the regulations is the shift in warning responsibility. The new regulations change the focus of the warning from retail establishments to manufacturers, distributors or other non-retailers. With the requirement that these non-retailers provide written notice to the “authorized agent” of retailers, OEHHA has placed the burden of warning further up the product chain.

If a product does not have the warning labels affixed to it, a company must provide written notice through the chain of distribution. The notice must state what products are at issue and which chemicals are listed under Prop. 65. Further, the notice must include all necessary warning materials, such as the labels or shelf signs, and information about online sales. The company

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giving notice must also confirm in writing or electronically that the retailer received the notice. Finally, the notice must be renewed within the first six months during the first year after the effective date and annually thereafter.

Retailers maintain the responsibility of warning under the following five circumstances:

- The retailer sells the product under a brand or trademark that it owns or licenses;
- The retailer knowingly introduced a listed chemical into the product;
- The retailer covered, obscured or altered a warning sent via the notice provisions described above;
- The retailer ignored the notice and warning materials sent to it; or
- The retailer has actual knowledge of the potential exposure, and no other upstream company can be served in California or has 10 or more employees pursuant to the statute.

Shook can help companies understand these Prop. 65 changes and provide counsel on adapting product labels to comply. For further information about these changes, please contact us.



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Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended

clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.



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